MEASURES OF DAMAGES FOR THE WILFUL BREACH OF A CONTRACT FOR WORK AND LAROR.

Considerable dispute has arisen as to the right of a servant or employee to recover for his services when he has quit his employment before his term has expired, and without any justification.

In the recent case of *Hedges v. Slaughter,* 130 S. W. (Tex. Civ. App.), 592, the Court of Appeals of Texas reaffirmed its previous doctrine regarding this question. The plaintiff in this case had contracted with the defendant to perform certain services. The plaintiff left the defendant's service without any justification and before his term had expired. The court held that where an employee abandons his contract he may recover the reasonable value of the work performed, not exceeding the contract price, less any damage sustained by the employer, regardless of whether the services were of actual value to the latter.

The foregoing doctrine has been repudiated by a long line of decisions, both in this country and in England, but "the reason of the thing and the trend of legal development are clearly in favor of it." *Scott, Cases on Quasi Contracts,* 761.

The leading case in support of the doctrine that a wilful and inexcusable default of the servant is no bar to his recovery is *Britton v. Turner,* 6 N. H., 481. The measure of recovery allowed the plaintiff is the value of his services as against the damages sustained by the defendant for his non-performance. The Court states in the opinion, "We think the technical reasoning, that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it; that the contract being entire there can be no apportionment; and that there being an express contract no other can be implied, even upon the subsequent performance of service, is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe that the general understanding of the community is that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary."

That the present doctrine is based on justice and right upon principle, however technical the common law may have been, seems to be the opinion of *Chitty on Contracts,* 846. "It is difficult to discover a reason emanating from any principle of equality or justice for holding that a servant who has been wrongfully dismissed by his master before his term has expired shall be held to allow for other eligible employment he might obtain during the residue of his term, which would not on the other hand require that the master, when the servant has wrongfully deserted his service, should procure the services of another servant to fulfill the same employment, and then allow to the former the amount agreed to be paid, after deducting therefrom the wages paid to the latter and any damages and trouble suffered in consequence of the change of servants and procurement of a substitute."

In all of the cases in support of the above doctrine the courts have not been unmindful of the fact that when a person makes a fair contract he is entitled to have it fully performed, and if the plaintiff has wilfully refused to perform, the defendant should be entitled to damages. In *Britton v. Turner, supra,* Judge Parker, in referring to the benefit and advantage which the employer takes by the services, states that it is to be determined as follows: "The amount of value he receives, if any, after deducting the amount of damages; and if he elects to put this in defense he is entitled so to do, and the implied promise which the law will raise in such cases, is to pay such amount of the stipulated price for the whole labor as remains, after deducting what it would cost to procure a completion of the residue of the service, and also any damage which has been sustained by reason of the non-fulfillment of the contract."

Some courts have held that to allow no recovery on a *quantum meruit* would in effect operate as a forfeiture and in the nature of a penalty. In *Fenton v. Clark,* 11 Vt., 157, the Court said: "The theory on which it is based is not that it is the object of the law to punish the party for a violation of his contract, but to make the other party good for all damages he may sustain by such violation. Common justice should require that plaintiff should recover what defendant has been benefited, after deducting all damages he might have sustained by reason of such contract."

The opposite view, to the effect that the employee cannot recover, is apparently based upon the theory that the contracts are entire and the performance of them is a condition precedent to the right of the servant to recover. Some of the courts base their decisions on the doctrine, *expressum facit cessare tacitum. Davis v. Maxwell,* 12 Metcalf, 286, held that the plaintiff cannot abandon his express contract and resort to an action for a *quantum meruit* on an implied *assumpsit.*

The rule that implied promises do not exist where there are express stipulations is not without exceptions, but where the failure to perform the express contract is intentional, it is such bad faith that he can recover nothing. *Metcalf on Contracts,* 8.

Performance by the servant is a condition precedent to the master's liability, and he cannot recover on a *quantum meruit,* because an express contract always excludes an implied one in relation to the same matter. *Olmstead v. Beale,* 19 Pick., 528.

In order to recover under contracts for wages in which there is a specified length of time the courts sustaining this doctrine have held that the plaintiff must show full performance on his part or a release by his employer or some justifiable cause for leaving. Such contracts are entire. He cannot sue on the express contract, because performance is a condition precedent to the master's liability. *Thrift v. Payne,* 71 Ill., 408; *Lantry v. Parks,* 8 Cowen, 63.

"Mutual promises may be the whole consideration for each other, but it may nevertheless appear either expressly or impliedly from the nature of the contract that one is to be performed before the other. The promise which is to be first performed is independent, and the promises may enforce it or sue for its breach without having performed or offered to perform. The performance of the latter is conditional, that is, performance by the other is a condition precedent to any liability to perform it." *Clark on Contracts,* 669.

The granting of a quasi contractual remedy in these instances has been criticised, in that to allow such would be to encourage the breach of contract. "It would seem that a sound policy would require the courts to establish in the case if a wilful breach of

conditions implied in law the same rule as exists in the case of express conditions. To do otherwise would be to put a premium on breach of contract." *Keener on Quasi Contracts,* 232.

It has also been held that a court of equity has no more power than a court of law in such cases, and therefore cannot relieve a party from the consequences of his wilful non-performance. *Mallory v. Mackaye,* 92 Fed., 749.

From the cases it would appear that the weight of authority is decidedly in favor of the strict doctrine, that there can be no recovery where the servant has unjustifiably quit his employment before his term has expired. There are a number of jurisdictions, however, which sustain the opposite view, that there may be a recovery on *quantum meruit,* notwithstanding the fact that there is a legal contract in existence. Undoubtedly a tendency is manifest on the part of the courts to disregard the more strict rules of the common law and adopt those which justice and equity demand, and upon which the Texas court placed its decision in the principal case.